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Attorneys for Defendant
AFFINITY ENGINES, INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

GOOGLE INC., a Delaware corporation,

Plaintiff,

v.

AFFINITY ENGINES, INC., a Delaware corporation,

Defendant.

Case No. C 05-0598 JW (HRL)

DECLARATION OF RORY G. BENS IN SUPPORT OF

AFFINITY ENGINES, INC.'S MISCELLANEOUS ADMINISTRATIVE REQUEST TO FILE UNDER SEAL PURSUANT TO LOCAL RULES 7-11 AND 79-5:

(1) UNREDACTED REPLY BRIEF IN SUPPORT OF MOTION FOR FURTHER CASE MANAGEMENT CONFERENCE RE SCOPE OF BRIN AND PAGE DEPOSITIONS;

(2) EXHIBITS 1 – 10 TO THE REPLY DECLARATION OF RORY G. BENS IN SUPPORT OF REPLY BRIEF IN SUPPORT OF MOTION FOR FURTHER CASE MANAGEMENT CONFERENCE RE SCOPE OF BRIN AND PAGE DEPOSITIONS

Date: December 5, 2005
Time: 9:00
Judge: Hon. James Ware
Location: Courtroom 8, 4th Floor

Dockets.Justia.com

I, Rory G. Bens, declare as follows:

1. I am an associate with Orrick, Herrington & Sutcliffe LLP ("Orrick"), counsel for Defendant Affinity Engines, Inc. ("AEI") in the present action. I am over the age of eighteen and competent to make this declaration. I make each of the following statements based on my personal knowledge, and I could, if necessary, testify to the truth of each of them.

2. AEI's Reply Brief In Support of Motion for Further Case Management Conference Re Scope Of Brin And Page Depositions is being submitted for filing under seal because it quotes and references documents that both AEI and Google Inc. have designated "Highly Confidential – Attorneys' Eyes Only" under the terms of the protective order entered in the co-pending state court action. Specifically, the motion quotes and references documents, submitted as Exhibits 1 – 10 of the Bens Reply Declaration, which contain sensitive, confidential business information. Both parties have designated these documents as "Highly Confidential – Attorneys' Eyes Only" under the terms of the state court Protective Order.

3. The parties have not yet submitted a Protective Order in the instant action, but have agreed that all materials produced in the related, co-pending California state court action will be considered produced in the instant action. AEI previously submitted, in connection with its opening brief, a true and correct copy of a prior CMC statement in the instant case, reflecting such agreement and reflecting agreement to submit a protective order in this case similar to that entered in the California State Court action. Counsel for AEI has submitted a draft protective order to Google and counsel for Orkut Buyukkokten, but has not been able to finalize and file that order before it was necessary to file the underlying Reply Brief In Support of Affinity Engines, Inc.'s Motion for Further Case Management Conference Re Scope Of Brin And Page Depositions. A true and correct copy of the State Court Protective Order agreed to by the parties was earlier submitted in connection with AEI's opening brief. To the extent that the interests of independently represented Google employee Orkut Buyukkokten are implicated by these documents, AEI has communicated with Buyukkokten's counsel, who has agreed to AEI's use of these documents with respect to the underlying motion, provided that AEI files the documents under seal.

4. Because the Reply Brief In Support of Affinity Engines, Inc.'s Motion for Further Case Management Conference Re Scope Of Brin And Page Depositions contains confidential, sensitive business information, AEI has submitted the Reply Brief in redacted and unredacted forms. In the redacted version, for public filing, confidential and sensitive information has been concealed. The unredacted version of the Reply Brief is designated "Highly Confidential – Attorneys' Eyes Only" by AEI. AEI respectfully requests that the Court authorize the filing of the unredacted version of the Motion under seal pursuant to the terms of the state court Protective Order, to which the parties have agreed. AEI respectfully requests that only the redacted version of the Motion be filed publicly.

5. The Reply Declaration of Rory G. Bens attaches as Exhibits 1 through 10, copies of private business correspondence internal to Google describing sensitive, non-public business matters of Google. In particular:

a. *Bens Reply Decl. Exhibit 1*: is a sensitive internal Google business document, which Google has designated Highly Confidential – Attorneys' Eyes Only.

b. *Bens Reply Decl. Exhibit 2*: contains sensitive internal Google business correspondence, which Google has designated Highly Confidential – Attorneys' Eyes Only.

c. *Bens Reply Decl. Exhibit 3*: contains sensitive internal Google business correspondence, which Google has designated Highly Confidential – Attorneys' Eyes Only.

d. *Bens Reply Decl. Exhibit 4*: contains sensitive internal Google business correspondence, which Google has designated Highly Confidential – Attorneys' Eyes Only.

e. *Bens Reply Decl. Exhibit 5*: contains sensitive internal Google business correspondence, which Google has designated Highly Confidential – Attorneys' Eyes Only.

f. *Bens Reply Decl. Exhibit 6*: contains sensitive internal Google business correspondence, which Google has designated Highly Confidential – Attorneys'

Eyes Only.

g. *Bens Reply Decl. Exhibit 7*: contains sensitive internal Google business correspondence, which Google has designated Highly Confidential – Attorneys' Eyes Only.

h. *Bens Reply Decl. Exhibit 8*: contains sensitive internal Google business correspondence, which Google has designated Highly Confidential – Attorneys' Eyes Only.

i. *Bens Reply Decl. Exhibit 9*: contains sensitive internal Google business correspondence, which Google has designated Highly Confidential – Attorneys' Eyes Only.

j. *Bens Reply Decl. Exhibit 10*: contains sensitive internal Google business correspondence, which Google has designated Highly Confidential – Attorneys' Eyes Only.

6. All such correspondence has been designated by either Google or Affinity Engines, "Highly Confidential – Attorneys' Eyes Only" under the terms of the state court Protective Order. AEI believes that all such information is, in fact, highly confidential business information for which good cause exists to file under seal.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed this 21st day of October, 2005 at Menlo Park, California.

/s/ Rory G. Bens
Rory G. Bens